

C. SODY SODERSTROM

IBLA 85-668

Decided February 20, 1987

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rescinding in part a proposed noncompetitive sale of public land. W-81674.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Sales

Under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), and applicable regulations, BLM may resolve an unauthorized use of public land by private, noncompetitive sale of the parcel. It is within the discretion of the authorized officer to exclude from sale lands considered to have wetland and riparian values and to retain such lands in public ownership.

APPEARANCES: C. Sody Soderstrom, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

C. Sody Soderstrom appeals from a May 6, 1985, decision by the Wyoming State Office, Bureau of Land Management (BLM), rescinding in part a proposed noncompetitive sale of 3.75 acres of public land. The land is described as follows:

6th Principal Meridian, Wyoming

T. 46 N. R. 99 W.

Sec. 13: S 1/2 S 1/2 S 1/2 SE 1/4 SE 1/4 SE 1/4 1.25 acres Sec. 24: Lot 3
2.50 acres

On September 7, 1983, BLM issued a Notice of Realty Action (NORA) which proposed selling the parcel to appellant and his wife by direct noncompetitive sale pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982), at appraised fair market value. As indicated in the NORA, the sale was intended to resolve an unauthorized occupancy on public lands:

Soderstroms' [sic] own a large, quonset type building valued at \$100,000 which is located mainly on their private land, but a

small area of the building and access road extend onto public land. ^{1/} The building and other facilities house an oil field service business. Disposal by direct sale will protect their equity investment in the improvements on the land and eliminate any undue hardship if they were compelled to remove or otherwise dispose of the improvements.

The NORA stated that the land was difficult and uneconomical to manage as part of the public lands, did not have legal public access, and was not suitable for management by another Federal agency. Significantly, the NORA also stated disposal of the land would not have any significant effect on resource values. ^{2/} The NORA was published on September 27, 1983, and provided a period of 45 days in which interested parties could file comments. It also stated that "[a]ny adverse comments will be evaluated by the District Manager, who may vacate or modify this Realty Action."

Protests were filed by the Wyoming Game and Fish Department on October 12, 1983, and by the U.S. Fish and Wildlife Service (FWS) on October 31, 1983. Both protests expressed concern regarding Grass Creek, a small perennial stream which flows through approximately 400 feet of the 2.5-acre portion of lot 3, and noted that the creek is designated as a trout fishery of regional importance. The Wyoming Game and Fish Department stated it did not object to the sale, but because of the fisheries value of Grass Creek, recommended that BLM retain public access to the 2.5 acres in lot 3 and enough land in sec. 13 to provide access to lot 3. The FWS was of the opinion that the sale "would result in a significant loss of public values in the form of fishing and recreational opportunities" currently provided by Grass Creek and stated there was no assurance that the private landowners would maintain and protect wetland values as required by section 203 of FLPMA, Executive Order (E.O.) No. 11990, and BLM policy. The FWS recommended that BLM retain ownership of the 2.5 acres in lot 3 and enough land in sec. 13 to provide public access to lot 3, or consider transfer of the subject and adjacent lands to the Wyoming Game and Fish Department.

On May 6, 1985, BLM issued its decision on the protests, stating:

In the original EA [Environmental Assessment] and Land Report, Lot 3 containing 2.5 acres and the approximately 400 foot stretch of Grass Creek, was not considered significant and not subject to Executive Order 11990. The concerns expressed by the

^{1/} The BLM decision of May 6, 1985, delineates the areas of unauthorized use:

"The unauthorized use consists of 19 feet of a 124 feet by 40 feet building, a cement approach slab on the east end of the building, approximately 6 feet of building on the northwest corner, and approximately 100 feet of access road from the east end of the building to the Grass Creek access road."

^{2/} BLM prepared an Environmental Assessment (EA), approved by the Grass Creek Area Manager on Aug. 29, 1983, which found the sale would not have a significant environmental impact on the human environment.

protests suggest that the conclusion reached in the original EA and Land Report were incorrect. After considering the values identified in the two responses it now appears that the public land with wetland and riparian values should be retained in public ownership or the existing use should be authorized in such a manner as to protect these values.

In considering the alternative of excluding from sale the riparian areas, which would reduce the size of the sale parcel to 1.25 acres, BLM noted that a cadastral survey, at an estimated cost of \$5,000, would have to be carried out to describe the smaller parcel, whose fair market value would be approximately \$560. BLM concluded the sale of the reduced parcel would proceed only if appellant paid for BLM's survey costs. If appellant declined, BLM would issue a lease pursuant to section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), authorizing appellant's facility with appropriate restrictions to protect the identified values.

In his statement of reasons, appellant rejects both alternatives, asserting that he is unable to afford the cost of a survey and that the proposed lease would be contrary to section 203(a)(1) of FLPMA, 43 U.S.C. § 1713(a)(1) (1982). Appellant disputes the importance of this reach of Grass Creek as a fishery habitat, alleging that the stream is polluted and filled with debris. Appellant asserts that BLM has been unable to manage the creek because it owns only 400 feet of riparian land, and contends that BLM is unable to properly manage the environmental values in conformance with FLPMA, E.O. No. 11990, or its own manual.

[1] We find that partial rescission of the sale and the alternatives offered by BLM to resolve the unauthorized use are in accord with the requirements of FLPMA, E.O. No. 11990, applicable regulations, and BLM policy. Section 203(a)(1) of FLPMA, 43 U.S.C. § 1713(a)(1) (1982), provides:

(a) Criteria for disposal; excepted lands

A tract of the public lands (except land in units of the National Wilderness Preservation System, National Wild and Scenic Rivers Systems, and National System of Trails) may be sold under this Act where, as a result of land use planning required under section 1712 of this title, the Secretary determines that the sale of such tract meets the following disposal criteria:

(1) such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency; * * *.

BLM originally justified the sale based on this provision. However, during the comment period following publication of the NORA, BLM received comments concerning wetland and riparian values which it had not theretofore evaluated as factors having a bearing on the sale. Subsequently, an analysis of the

wetlands on the parcel was prepared by BLM. ^{3/} The analysis, inter alia, discussed the extent and relative significance of the wetland area:

If one notes that 40 percent of the tract is occupied by perennial stream zone habitat, one must say it has significant wetland values since typical public land tracts in the GCRA [Grass Creek Recreation Area] contain only about .035 percent perennial stream zone wetlands. In essence the site in question contains 1,143 times more perennial stream zone habitat on a per unit basis, than do other public land tracts in GCRA. Also, the 400 feet of stream channel represents nearly 10 percent of the public land stream channel on Grass Creek. It is one of only six short stream reaches on public land along Grass Creek. This stream-zone segment supports the normal complement of fish and wildlife species typically found in association with perennial streams in this area.

The analysis also discussed whether the parcel could be sold and meet the requirements of E.O. No. 11990, 42 FR 26961 (May 25, 1977), 3 CFR 121 (1977), which reads in relevant part:

Sec. 4. When Federally-owned wetlands or portions of wetlands are proposed for lease, easement, right-of-way or disposal to non-Federal public or private parties, the Federal agency shall (a) reference in the conveyance those uses that are restricted under identified Federal, State or local wetlands regulations; and (b) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successor, except where prohibited by law; or (c) withhold such properties from disposal.

The policy to be followed by BLM in implementing the above order was recited in an April 7, 1983, memorandum from the Field Solicitor, Santa Fe, to the State Director, BLM, New Mexico, at pages 1 and 2:

As a follow-up to the Executive Order, the Bureau published guidelines and policies for wetland protection and management. 45 F.R. 7889 (February 5, 1980). These are reprinted in BLM Manual Part 6740. Bureau policy is to retain wetlands in Federal ownership unless "Federal, State, public and private institutions, and parties have demonstrated the ability to maintain, restore, and protect wetlands and riparian habitats on a continuous basis." BLM MANUAL § 6740.06(E)(1). [Footnote omitted.]

Section 203(e) of FLPMA, 43 U.S.C. § 1713(e) (1982), provides that the Secretary "shall determine and establish the size of tracts of public lands to be sold on the basis of land use capabilities and development requirements of the lands." As we observed concerning a decision about what lands to include in a sale under section 203 in Dean Anderson, 94 IBLA 88, 91 (1986): "[W]e give considerable deference to BLM decisions where

^{3/} The analysis, entitled "Wetland Analysis of W-81674," is undated but was forwarded to the Grass Creek Area Manager on Nov. 28, 1983.

they are based on firsthand knowledge of the land and on substantial evidence * * *. Such decisions may be overcome if an appellant offers a preponderance of countervailing evidence, but not if he simply disagrees." In this case, BLM's decision was based on substantial evidence and appellant's evidence has not overcome this evidence. Nor did appellant demonstrate an ability to maintain, restore, and protect the wetlands and riparian habitats on a continuous basis. We therefore conclude BLM's decision to exclude from sale the 2.5 acres encompassing the riparian areas of Grass Creek was in accord with the above-cited authorities and BLM policy. Further, BLM's decision to withdraw from sale such areas after considering wetland values is supported by regulation. While 43 CFR 2711.3-3(a)(5) provides that a direct sale may be utilized to resolve an unauthorized use, 43 CFR 2711.3-1(f) gives the authorized officer discretion to withdraw any tract from sale if he finds that "[c]onsummation of the sale would be inconsistent with the provisions of any existing law." We also conclude BLM's decision to offer the parcel for lease was proper. The lease is authorized under section 302(b) of FLPMA ^{4/} and inclusion in the lease of appropriate restrictions to protect wetland values is in accord with E.O. No. 11990.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge

^{4/} Under this section, the Secretary has the discretion to regulate use and occupancy of public lands through "easements, permits, leases, licenses, published rules, or other instruments as the Secretary deems appropriate." (Emphasis supplied.)

